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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH MORRIS ALLEN,

Defendant and Appellant.

C087187

(Super. Ct. No. 16FE023245)

A jury found defendant Kenneth Morris Allen guilty of attempted carjacking and also found true two prior serious felony conviction allegations. The trial court sentenced defendant to a total determinate term of 10 years and an indeterminate term of 25 years to life.

Defendant now contends (1) the trial court abused its discretion in admitting evidence that defendant had previously tried to pull a woman from her car, (2) the evidence was insufficient to support the attempted carjacking conviction, (3) the trial court abused its discretion and violated his right not to be subjected to cruel and unusual punishment by denying his motion to dismiss one or both of the prior strike convictions, and (4) we must remand to permit the trial court to exercise its new discretion under Senate Bill No. 1393 to strike the two prior serious felony conviction enhancements.

We conclude (1) the trial court did not abuse its discretion in admitting evidence of the prior similar act, (2) the evidence was sufficient to support the attempted carjacking conviction, (3) the trial court did not abuse its discretion in denying the motion to dismiss the prior strike convictions and defendant was not subjected to cruel and unusual punishment, and (4) we will remand to permit the trial court to exercise its discretion whether to dismiss one or both of the five-year prior serious felony conviction enhancements.

BACKGROUND

The following incidents occurred on December 10, 2016.

Defendant, uninvited, entered the apartment of Jennifer C. in Sacramento around midday. Defendant said he lived there, but Jennifer told defendant he needed to leave. Defendant stepped out of the apartment and Jennifer closed the door.

Scott E. lived in the apartment directly under Jennifer's apartment. As Scott was leaving his apartment, he encountered defendant, who appeared to be doing something with a methamphetamine pipe. Scott asked defendant if he was visiting someone in the apartment complex, and defendant indicated he was visiting someone in Scott's apartment. Scott disagreed and asked defendant to leave. Defendant refused to leave, and Scott called the police. Scott obtained a kitchen knife from his apartment, pushed defendant, and told him again to leave; but when Scott dropped the knife and began to retreat, defendant picked up the knife, attacked Scott, and threw the knife. Scott suffered injuries to his hand and chest.

At another apartment complex in the early afternoon, defendant entered the apartment of Jack G. Jack told defendant to leave, but defendant pushed Jack out the door and locked it. Jack crawled back in through a window. Defendant, who appeared to be high, picked up an iron and held it like a weapon, but soon left the apartment, sat down, and in Jack's words, "broke down." Defendant eventually left the area.

Around 1:30 p.m., Mark M. pulled into a service station to get gas. He left the key fob in the car and went into the market, but when he returned to the car, defendant was sitting in the driver's seat. Mark told defendant to get out of the car, but defendant claimed it was his car. The car had a push-button ignition and it appeared to Mark that defendant did not know how to start the car. When Mark "tussled" with defendant in an attempt to obtain the key fob, defendant eventually pointed his right hand at Mark like it was a gun and said "bang." Mark was concerned that something could happen or that defendant might have a weapon, so Mark backed up and yelled that defendant was stealing his car. When another man came over, defendant got out of the car, threw down the fob, and walked away.

Defendant walked to the residence of Kenna D. and went upstairs to her porch. After Officer Wesley Aslin and other police officers arrived and demanded that defendant come down, defendant tried to get into Kenna's residence and threatened to kill the officers. After about two hours, the officers subdued defendant.

A jury found defendant guilty of the attempted carjacking of Mark (Pen. Code, §§ 664/215, subd. (a))¹ but acquitted him of assault with a deadly weapon on Scott (§ 245, subd. (a)(1)) and criminal threats against Officer Aslin (§ 422). The jury also found true two prior serious felony conviction allegations: a 1989 conviction for witness intimidation (§ 136.1, subd. (c)) and a 1998 conviction for attempted robbery (§§ 664/211).

The trial court sentenced defendant to a term of 25 years to life under the three strikes law for the attempted carjacking conviction and added five years each for defendant's two prior serious felony convictions, for a total determinate term of 10 years and an indeterminate term of 25 years to life.

¹ Undesignated statutory references are to the Penal Code.

DISCUSSION

I

Defendant contends the trial court abused its discretion by admitting evidence that defendant tried to pull a woman from her car at a service station six months before the attempted carjacking in this case.

Evidence that a defendant committed bad acts other than those currently charged may not be admitted to prove the defendant's bad character or criminal disposition. (Evid. Code, § 1101, subd. (a).) But nothing in Evidence Code section 1101 "prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b).) The uncharged bad act must share sufficiently similar features to the charged offense to support a rational inference of, as relevant here, identity, a common plan, or intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403.) A trial court's decision to admit evidence under Evidence Code section 1101, subdivision (b), "being essentially a determination of relevance, is reviewed for abuse of discretion." (*People v. Carter* (2005) 36 Cal.4th 1114, 1147.)

The prosecution made a motion in limine to admit evidence that defendant had committed an act similar to the charged attempted carjacking. In that incident, which occurred in Sacramento six months before the attempted carjacking against Mark, defendant approached a vehicle that had just pulled into a service station. Defendant opened the driver's door, grabbed the driver by the arm, and tried to pull her out of the vehicle. The driver pushed defendant away, closed the vehicle door and locked it. The defense opposed the motion to admit the evidence.

The trial court admitted the evidence, saying the evidence was relevant to intent and common plan, the prior act had a high degree of similarity to the attempted carjacking against Mark (Evid. Code, § 1101, subd. (b)), and the probative value of the

evidence was not substantially outweighed by the likelihood of undue prejudice, confusion of issues, or misleading the jury. The trial court said it would give a limiting instruction concerning the prior act evidence.

On appeal, defendant argues the trial court abused its discretion because the incidents were not similar and the prior incident did not show defendant had a plan to steal the victim's vehicle. Defendant claims he made statements to the victim in the prior incident about how she almost hit him and about her giving him a ride, and argues those statements show the prior incident was not similar to the charged attempted carjacking, in which he entered the victim's vehicle after the victim left the vehicle. But we reject his argument because he does not cite to the record and establish that his alleged statements were presented to the trial court before it made its ruling (see *People v. Hendrix* (2013) 214 Cal.App.4th 216, 243 [we consider facts known to the court at the time of the ruling]), and because the difference in purported facts between the two incidents is not enough to overcome the trial court's observation and ruling that the two incidents were sufficiently similar to show a common plan and intent. The jury could reasonably infer from the facts of the prior incident that defendant intended to steal the victim's vehicle by pulling her from it and taking it. Therefore, the trial court did not abuse its discretion in admitting evidence of the prior act.

II

Defendant next contends the evidence was insufficient to support the attempted carjacking conviction because there was no substantial evidence he took a direct step pursuant to a plan to take the victim's car from the victim's immediate presence.

Carjacking is the taking of a motor vehicle that is possessed by another person, from that person's immediate presence, against the person's will, and with the intent to either permanently or temporarily deprive the person of possession of the vehicle, accomplished by means of force or fear. (§ 215.) "Attempt consists of (1) a specific

intent to commit a crime and (2) a direct but ineffectual act done toward its commission.”
(*People v. Marquez* (2007) 152 Cal.App.4th 1064, 1067, italics omitted.)

Defendant’s argument is based on his view of certain evidence, but when we review the judgment for sufficient evidence, we examine the record in the light most favorable to the judgment and draw reasonable inferences to support the judgment. (*People v. Houston* (2012) 54 Cal.4th 1186, 1215.) Here, defendant entered the car, obtained the key fob, physically resisted Mark’s attempt to regain possession of the fob, and appeared not to know how to start the car with the fob. The jury could reasonably infer that, but for defendant’s ignorance concerning how to start the car with the fob, he would have taken the car.

According to defendant, it was pure speculation that he did not know how to start the car; defendant never demanded that Mark show him how to start the car. That may have been an argument to make to the jury, but viewing the evidence in the light most favorable to the judgment, it does not convince us there is insufficient evidence of attempted carjacking. Defendant further argues the evidence was insufficient to support the attempted carjacking conviction because the trial court abused its discretion in admitting the prior act evidence. We have already rejected the argument that the trial court abused its discretion in this regard.

III

Defendant, who was 58 years old at the time of sentencing, contends the trial court abused its discretion and violated defendant’s right not to be subjected to cruel and unusual punishment by denying defendant’s motion to dismiss one or both of the prior strike convictions.

A

In defendant’s motion to dismiss the prior strike conviction allegations, defendant informed the trial court that he had been shot in the head when he was 24 years old. He claimed he was forever changed and the injury caused him “lasting physical and mental

disabilities that include anxiety, paranoia, loss of sleep, headaches, and partial hearing loss in his left ear.” According to defendant, he became addicted to drugs and suffered from the loss of loved ones. The prosecutor expressed support for striking the 1989 prior strike conviction for witness intimidation.

Mark, the victim of the attempted carjacking, attended sentencing and addressed the trial court, but did not testify under oath at sentencing. He said defendant appeared “out of it” at the time of the attempted carjacking, like he was “perhaps mentally ill,” and Mark did not think defendant “appreciate[d] what was going on.” Mark said he was not threatened and was not harmed, although at trial he testified he had stepped away from the car out of fear.

Defendant addressed the trial court and claimed he would not be in the courtroom if Scott had not pulled a knife on him. Defendant said he was dealing with difficult circumstances at the time and that he was falsely accused.

In response, the prosecutor noted there was no evidence that defendant was mentally ill. There had been no evaluation. The prosecutor also noted that just four days before the crime in this case, defendant had been granted probation in a case involving carrying a concealed dirk or dagger. Probation was granted because of the decision by the district attorney not to charge the prior strike convictions in that case.

The trial court made a detailed ruling on defendant’s motion to dismiss the strike convictions, addressing defendant’s long-term criminality and his failure to be rehabilitated. The trial court explained that the remoteness of the two prior strike convictions did not weigh in defendant’s favor because he did not refrain from criminal behavior since then. Defendant has 19 criminal convictions and seven are felony convictions. He was placed on felony probation just four days before he committed the attempted carjacking. And defendant engaged law enforcement in a standoff after the attempted carjacking. According to the trial court, defendant’s potential for rehabilitation

is extremely poor. The trial court concluded defendant is not outside the spirit of the three strikes law and it denied defendant's motion.

B

A sentencing court has discretion to dismiss a strike (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497), but that discretion is of a limited nature. (*People v. Bonnetta* (2009) 46 Cal.4th 143, 153.) The court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit" (*People v. Williams* (1998) 17 Cal.4th 148, 161.) We review a sentencing court's decision on a *Romero* motion for abuse of discretion. (*Romero*, at p. 532.) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

Here, defendant argues the trial court's ruling was irrational, arbitrary and unreasonable because defendant had been shot in the head and had led a difficult life since that injury. But there was no testimony or other evidence, expert or otherwise, regarding his head injury or its effects, either in trial or at sentencing. Instead, the trial court had information showing a long history of criminality and a failure to rehabilitate. Defendant has not established an abuse of discretion.

Defendant also argues the sentence violated his state and federal constitutional rights not to be subjected to cruel and unusual punishment because the punishment is disproportionate to the crime.

"Under the Eighth Amendment of the United States Constitution, 'the courts examine whether a punishment is grossly disproportionate to the crime.' [Citation.] 'Under the California Constitution, a sentence is cruel or unusual if it is so disproportionate to the crime committed that it shocks the conscience and offends

fundamental notions of human dignity.’ [Citation.]” (*People v. Johnson* (2013) 221 Cal.App.4th 623, 636.)

In making his argument, defendant fails to account for his life of crime and its effect on the trial court’s sentencing decision. “In imposing a three strikes sentence, the State’s interest is not merely punishing the offense of conviction, or the ‘triggering’ offense: ‘It is in addition the interest . . . in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law.’ ” (*Ewing v. California* (2003) 538 U.S. 11, 29 [155 L.Ed.2d 108] [federal Constitution]; see also *People v. Mantanez* (2002) 98 Cal.App.4th 354, 359 [state Constitution].) Taking into consideration defendant’s past criminality and his failure to be rehabilitated, along with his current conviction for attempted carjacking, the three strikes sentence of 35 years to life is not cruel and unusual under the state and federal Constitutions.

IV

Defendant contends we must remand for the trial court to exercise its new discretion under Senate Bill No. 1393 (2017-2018 Reg. Sess.), which applies retroactively, concerning whether to strike the five-year terms for the two prior serious felony convictions pursuant to section 667, subdivision (a)(1). (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 971-972 [Senate Bill No. 1393 applies retroactively to judgments not yet final].) The Attorney General agrees that Senate Bill No. 1393 applies retroactively to defendant’s case but argues we should not remand because the trial court’s refusal to dismiss one or both of the prior strike convictions for the purpose of three strikes sentencing makes it apparent the trial court would not have dismissed one or both of the prior serious felony convictions for the purpose of imposing the five-year enhancements.

While it is true the trial court refused to dismiss the prior strike convictions for the purpose of three strikes sentencing, it did not have occasion to consider dismissing those

same convictions relevant to the five-year enhancements, which was a different issue from three strikes sentencing. Because the trial court did not clearly indicate how it would have exercised such discretion (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 [remand not required if trial court clearly indicated it would not have dismissed enhancement]), we will remand the matter to give the trial court the opportunity to exercise its discretion.

DISPOSITION

The matter is remanded to the trial court so that it may exercise its discretion whether to dismiss one or both of defendant's five-year prior serious felony conviction enhancements and, if appropriate following exercise of that discretion, to resentence defendant accordingly and provide an amended abstract of judgment to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

/S/
MAURO, Acting P. J.

We concur:

/S/
KRAUSE, J.

/S/
BUTZ, J.*

* Retired Associate Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.